Supreme Court of the United States

OCTOBER TERM, 1936

No. 575

WILLIAM ELMER BROWN, JR.,

Petitioner,

vs.

EDWARD J. O'KEEFE, Receiver of THE UNION NATIONAL BANK OF ATLANTIC CITY, NEW JERSEY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

Reply Brief of Petitioner

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STATEMENT.

This memorandum is filed in reply to certain of the arguments advanced in the brief of respondent and for the purpose of discussing some of the authorities cited therein.

I.

REPLY TO RESPONDENT'S POINT IV—A-1 (Brief, p. 5).

It is urged by respondent that "debts" as comprehended by Section 63-a-4 of the Bankruptcy Act (Act of Cong., July 1, 1898, c. 541, §63, 30 Stat. 562; 11 U. S. C. §103), includes only those claims as "were fixed in amount or were susceptible of liquidation as of the date of the filing of the petition." *Zavela v. Reeves*, 227 U. S. 625, and *Manhattan Properties v. Irving Trust Co.*, 291 U. S. 320, are cited (B. 6) as authority. It is argued that the stock liability is not in existence until assessed and therefore not due and owing until then. This is in effect saying that the limitation of Section 63-a-1 must be read into 63-a-4.

This Court said in *Maynard v. Elliott*, 283 U. S. 273, 277, that the case of *Zavela v. Reeves, supra*, does not support that contention. *In re Paramount Publix Corporation*, 73 F. (2d) 219 (C. C. A. 2, 1934), it is said (p. 221):

> "In Manhattan Properties v. Irving Trust Co., * * *, the case of Maynard v. Elliott is mentioned three times without criticism. Under such circumstances it cannot be supposed that the general rule laid down in Maynard v. Elliott and Williams v. U. S. Fidelity that claims 'founded upon contract, which at the time of the bankruptcy are fixed in amount or susceptible of liquidation, may be proved * * * although not absolutely owing when the petition is filed' was done away with *sub silentio* in Manhattan Properties v. Irving Trust Co. The latter decision merely made it clear that this rule did not affect settled doctrines of long standing relating to provability in bankruptcy of claims for future rentals under leases."

"Debt" is defined, in §1 (11) of the Bankruptcy Act (Act of Cong., July 1, 1898, c. 541, §1, 30 Stat. 544; 11 U. S. C. §1), to include "any debt, demand or claim." It was said in *Maynard v. Elliott* (at p. 275) that "the obligation of an endorser is at least a 'claim,' and hence a debt so far as defined by §1 (11); and the language of §63, which permits proof of a claim 'founded • • • upon contract, express or implied,' is broad enough to embrace the liability of an endorser upon negotiable paper which has not matured at the time of the adjudication." So also might the same be said of stockholder's liability to assessment.

II.

REPLY TO RESPONDENT'S POINT IV—A-2.

It is contended (B. 7 and 8) that by decision in *McClaine v. Rankin*, 197 U. S. 154, this Court overruled all prior holdings that the liability of a stockholder of a national bank was contractual and that since that decision "it appears conclusively that the liability • • • arises by force of the statute upon which it is based." The cases of *Christopher v. Norvell*, 201 U. S. 216, and *Forrest v. Jack*, 294 U. S. 158, are also referred to.

Inasmuch as great reliance is placed in *McClaine v. Rankin, supra*, it is well to carefully analyze the opinion in that case. This is well done by the Circuit Court of Appeals for the Ninth Circuit in *Erickson v. Richardson*, 86 F. (2d) 963, 969, 970. It is there pointed out that this Court regarded the statutory liability of the stockholder as "quasi-contractual" and the question as stated in that case expressed "a classification between 'simple contracts' and quasi contracts, or contracts provided by statute but created by subsequent acts of the obligor, the framework

of whose obligation is determined by the statute." It is further noted that the McClaine case cites with approval *Platt v. Wilmot,* 193 U. S. 602, in which it was decided that a State bank stockholder's liability was "created by statute, because *the statute is the foundation for the implied contract arising from the purchase of, or subscription for, the stock.*" (Italics supplied.) Continuing, the Court in the Erickson case further quotes from the opinion in *Platt v. Wilmot,* as follows:

> "Also, *while the liability is contractual in its nature,* it arises out of the Constitution or the statute, or from a combination of both, by virtue of the application of general principles of law to the facts in the case. Neither the Constitution nor the statute says that the liability is contractual, but, as the Constitution and statute existed, the liability arising therefrom, as against the stockholder, is because of the principle of law which works out a *contractual* liability upon these facts, and it may be fitly described as the common law."

Finally the Court, in the Erickson case, concludes by saying:

> "We cannot agree with appellant that the phrase 'contract express or implied' as used in the Bankruptcy Act should be interpreted, by reason of the McClaine Case, as within the narrow area prescribed by the Washington statute imposing limitations — to 'simple contracts' as distinguished from all other obligations having a contractual nature."
>
> "The criterion of Maynard v. Elliott, *supra,* requires the broader interpretation."

In the case of *Christopher v. Norvell, supra,* cited by respondent herein, the question was whether a married woman in Florida was liable for an assessment as shareholder in a national bank to the creditors of the bank, the

law of that State forbidding her to make binding contracts. It was there held that while there may be contractual features in this liability of a stockholder in a national bank, she was at any rate liable because the liability had been created by statute. This Court there recognized (at p. 228) that "in a limited sense there is an element of contract in her having become a stockholder."

As for the case of *Forrest v. Jack*, cited by respondent, it is sufficient to note that this Court cited *McDonald v. Thompson*, 184 U. S. 71, at pp. 73 and 74, where it is said that

> "granting *there was a contract* • • •, *this was a contract created by the statute,* • • • *implied from the express contract of the stockholders to take and pay for shares in the association.* • • • The statute was the origin both of the right and the remedy, *but the contract was the origin of the personal responsibility of the defendant.*" (Italics supplied.)

Also respondent relies upon *Pufahl v. Parks*, 299 U. S. 217, 222, but in citing from the opinion of this Court, he deletes that portion which seems to contradict his interpretation of it. The omitted portion reads as hereafter italicized:

> "The liability is imposed by the statute. *The original subscriber and likewise an immediate or remote vendee of the shares assumes a status — that of stockholder. The assumption of this status involves whatever conditions or burdens the federal statutes have imposed as incident to the holding of national bank shares.*"

Respondent also cites (R. 9) several opinions of other courts all of which are distinguishable. For instance, the case of *Laurent v. Anderson*, 70 F. (2d) 819, 823, holds that the liability is "assumed" by the purchase of the stock.

There is an abundance of authorities, dated both before and since the McClaine Case, which sustain the view that the stockholder's liability is contractual.

III.

REPLY TO RESPONDENT'S POINT IV—A-3 (B. 10).

Respondent makes the point that

> "the stock assessment liability • • • is too contingent to be the basis of a provable debt and therefore is not affected by discharge. The liability was uncertain both as to amount and time."

First as to the amount. Petitioner's liability was limited to 100% of the par value of the stock. At least to that extent it was certain and fixed. But respondent says (B. 17),

> "there was no certainty, and there could be no certainty, as to the amount of assessment which might be necessary to be levied, *i. e.*, whether it would be a 25% or a 50% or a 100% assessment."

It has been decided by this Court that claims against endorsers, sureties and guarantors on immature obligations are provable, and, therefore, dischargeable. Notably *Maynard v. Elliott, supra.* Yet it cannot be asserted with certainty how much such an obligor will be required to pay until the obligation falls due and the principal debtor defaults.

As for the stock assessment liability, assume that after an assessment of 50% is made on national bank stock A., a stockholder, is adjudicated a bankrupt. Even respondent will concede, consistently with his argument, that the assessment as made is a dischargeable debt. Further

assume that after adjudication a second assessment of 50% is made. Respondent argues that assessment made after adjudication is not provable so not dischargeable. So, pursuing respondent's argument, in the assumed case we have the unusual situation of a bankrupt relieved of 50% of his stock assessment liability and still burdened with 50% thereof despite his discharge in bankruptcy. Such a result is out of all conformity with what this Court has recognized to be the purpose of the Bankruptcy Act. As was pointed out in the Erickson Case, *supra* (p. 965):

> "The first criterion, that the statute is to be interpreted 'to relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes,' would be violated by appellant's contention. Though yielding the stock to his creditors in bankruptcy, his discharge in bankruptcy would not enable him to start 'afresh free' from his 'business misfortunes.' He would still carry the 'weight of oppressive indebtedness,' for an assessment which would enrich the bank in which he no longer had a stockholder's interest."

It is asserted by respondent that there was no one who could file a claim in this case. On this basis respondent inquires, "if there was no one who could file claim, how could a bankruptcy court allow any such claim?" (B. 11.)

It was not necessary that any claim should be filed immediately after adjudication. Sec. 57-n of the Bankruptcy Act, as amended May 27, 1926 (Act of Cong., July 1, 1898, c. 541, §57, 30 Stat. 560; Feb. 5, 1903, c. 487, §12, 32 Stat. 799; May 27, 1926, c. 406, §13, 44 Stat. 666), limits the time for filing claims to "six months after the adjudication." Petitioner was adjudicated bankrupt on April 21, 1933. Respondent concedes that petitioner's liability

to assessment was subject to determination on September 30, 1933, the date when respondent contends the Union National Bank became in default to the Atlantic City National Bank under the terms of the contract between them. (B2 and 11.) This latter date occurred less than "six months after the adjudication" yet no effort was made to prove the claim. Collier in his work on Bankruptcy, Thirteenth Edition, Vol. II, p. 1180, says:

> "The filing of a clear statement of the claim in writing, duly verified, within the year" (now six months) "is sufficient, even though it may be liquidated and allowed after that time." Citing *In re Mertens* (C. C. A. 2d), 147 F. 177.

Respondent's predecessor in office, Slaughter, knew that a maximum assessment was to be made before it was levied. (R. 45.) In fact, he deducted such an assessment from trust funds in his hands prior to levy of the assessment by the Comptroller. (R. 38.) How then can the respondent argue that the assessment was uncertain and "too contingent" to be proved prior to assessment?

In re F. & W. Grand Properties Corp., 74 F. (2d) 224 (C. C. A. 2—1934), it was held that a creditor might satisfy the requirement that proof of claim be presented within the time specified by §57-n by beginning liquidating litigation within that period.

In re Gellman, 13 F. Supp. 643 (D. C., W. D. N. Y.—1936), it was held that an unliquidated claim arising out of alleged negligence of bankrupt is a provable debt if reduced to judgment within 30 days before or after expiration of six months from adjudication. In this case adjudication occurred on May 28, 1935, the litigation was commenced on Dec. 11, 1934 and was concluded on Feb. 11, 1936. The Court indicated in its opinion that if the claimant had presented some instrument within the period

of six months which would establish the relation of debtor and creditor it might be considered a proof of claim amendable after the expiration of six months.

See also *Irons v. Manufacturer's National Bank* (C. C., N. D. Ill.), 17 F. 308, (petitioner's main brief, p. 31) and *In re Paramount Publix Corporation*, 8 F. Supp. 644, affirmed 72 F. (2d) 219 (C. C. A. 2).

In answer to respondent's query, "how could a bankruptcy court allow any such claim," the Court, in the Irons Case, said (at p. 314) "the court of bankruptcy would undoubtedly have given time, and so far delayed the proceedings as to enable such an estimate to be made before closing the affairs of the bankrupt estate and ordering a final dividend."

IV.

REPLY TO RESPONDENT'S POINT B-1 INSOFAR AS IT REFERS TO ERICKSON V. RICHARDSON.

Erickson v. Richardson is cited in petitioner's main brief (p. 27). At the time of the filing of that brief the only reference to that case available to petitioner was the Commercial Clearing House Bankruptcy Law Service mentioned. It has since been reported in 86 F. (2d) 963. What was thought to be the opinion of the Court quoted in petitioner's main brief (p. 27) turns out to be merely the Law Service comment thereon.

The majority opinion of the Court in the Erickson case is a thorough, logical and exhaustive treatise of all the points here involved. It might well be adopted as a brief for petitioner in this case.

Respondent attempts to distinguish the Erickson case on three grounds. (B. 14) The first is that the bank in

that case had been declared insolvent before the stockholder's adjudication. Inquiry into the facts of the instant case will disclose that it cannot be differentiated from the Erickson case on that ground. If respondent is here taking the position that insolvency is the condition which fixes the stockholder's liability then that condition had happened in the instant case. It was admitted on the motion to strike (which is in the nature of a demurrer) that the Union National Bank was insolvent prior to petitioner's adjudication in bankruptcy. So in that respect the two cases are similar.

Throughout every other part of respondent's brief it is contended that no liability on national bank stock is fixed and, therefore, provable until assessment is made thereon. And further, that inasmuch as the assessment on petitioner's stock had not been made at the time of his adjudication it was not a provable and dischargeable debt.

In the Erickson case the assessment was levied about two months after the date upon which the petition in bankruptcy was filed. In the instant case the assessment was made about five months after filing petition. In this respect, therefore, both cases are similar.

Respondent secondly argues that the trustee in the instant case had abandoned the stock and thus revested title in the petitioner whereas in the Erickson case there had been no abandonment by the trustee. This is not a distinguishing feature. It has no bearing on the question whether the stock liability is dischargeable in bankruptcy prior to assessment which is the principal question involved in this and the Erickson cases.

Thirdly, respondent contends that the Erickson case is distinguishable because the Court in that case, "in holding that the assessment claim was a debt arising out of a contract and consequently provable in bankruptcy, followed

the construction placed upon the Constitution of the State of California by the highest court of that State." The law construed was a California statute (Act 652a, 1 General Laws, California, 1931, p. 314) and it is sufficient answer to respondent's contention to note that the provisions of that Act are identical with the corresponding section of the National Banking Act (Act of Cong., Dec. 23, 1913, c. 6, §23, 38 Stat. 273; 12 U. S. C. §64).

Respondent points to the dissenting opinion in the Erickson case as the better law. A study of both the prevailing and dissenting opinions of the court in that case will not support the contention of respondent.

Both opinions in the Erickson case refer to the instant case as decided in the Circuit Court of Appeals (p. 972). It is pointed out that it was "held, *rightly or wrongly,* that his" (petitioner herein) "bank stock had never passed to the trustee in bankruptcy." Finally the court (C. C. A. 9) in the Erickson case refuses to follow the opinion here "whether it be dictum or decision." And it is there commented (p. 972), "it is contrary to the more recent holding of the Sixth Circuit in *Barbour v. Thomas, supra,* and to that of the Fourth Circuit in *Chisholm v. Gilmer, supra,* and fails to consider any of the federal authorities on which this opinion is based."

CONCLUSION.

It is respectfully submitted that the judgments below should be reversed.

Respectfully submitted,

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